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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

LOU RAINES RIFFE, Administratrix
of the Estate of Don C. Riffe,
Petitioner,
v.

INTERNATIONAL HARVESTER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED FOR REVIEW

Does a state appellate court's reversal of a jury verdict in favor of the plaintiff constitute a denial of due process where the court arbitrarily and capriciously ignores, reweighs, and discounts evidence presented by the plaintiff at trial?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Lou Raines Riffe, Administratrix of the Estate of Don C. Riffe - Petitioner
2. The Estate of Don C. Riffe
3. International Harvester Company - Respondent
4. Peter Cave Coal Company
5. Wolfe Creek Collieries

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
JURISDICTION	vi
OPINIONS BELOW	vi
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	vii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING CERTIORARI	7
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX	A1

TABLE OF AUTHORITIES

Cases	Page
American Railway Express Co. v. Kentucky, 273 U.S. 269 (1927)	10
Barret v. Stephany, 510 S.W. 2d 524 (Ky. 1974)	12
Board of Regents v. Roth, 408 U.S. 564 (1972)	9
Bose Corp. v. Consumers Union of United States, Inc., No. 82-1246	7-8
Davis v. Alaska, 415 U.S. 308 (1974)	11-12
Evans v. City of Chicago, 522 F. Supp. 789 (N.D. Ill. 1980)	9
Fontana v. Barham, 707 F.2d 221 (5th Cir. 1933)	9
Gallick v. Baltimore & Ohio Railroad, 372 U.S. 108 (1963)	12
Goldberg v. Kelly, 397 U.S. 254 (1970)	12
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	9-10, 10
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	8

Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285 (1883) 8-9

Martinez v. California, 444 U.S. 277 (1980) 8

Mathews v. Eldridge, 424 U.S. 319 (1976) 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 8

Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464 (1918) 10

Rogers v. Kasdan, 612 S.W. 2d 133 (Ky. 1981) 12

Roland v. Murray, 239 S.W.2d 967 (Ky. 1951) 12-13

Tennant v. Peoria & Pekin Union Railway, 321 U.S. 29 (1944) 12

United States v. Raddatz, 447 U.S. 667 (1980) 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XIV ..... vii, 8, 10

28 U.S.C. Sec. 1257(3) (1976) vii

Ky. Rev. Stat. 411.310(2) (1972) ..... vii, 4, 7

OPINIONS BELOW

The Order Denying Motions for Discretionary Review of the Kentucky Supreme Court was entered on October 26, 1983. The text of said order is set out in the Appendix at A 3 to A 4. The opinion of the Kentucky Court of Appeals is reported as *International Harvester Company v. Lou Raines Riffe, et. al.*, No. 82-CA-403-MR (June 3, 1983). The text of said opinion and order thereon are set out in the Appendix at A 5 to A 8.

JURISDICTION

The order of the Kentucky Supreme Court denying petitioner's Motion for Discretionary Review was entered on October 26, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests upon the due process clause of the fourteenth amendment to the United States Constitution, which provides that:

> No state shall . . . deprive
> any person of life, liberty,
> or property without due process
> of law . . . .

While not at issue on this appeal, Kentucky Revised Statutes Sec. 411.310(2) will be referred to and discussed herein. The text of that statute is set out in the Appendix at A19.

STATEMENT OF THE CASE

This appeal arises from a products liability lawsuit brought by petitioner Lou Raines Riffe, as the administratix of her deceased husband's estate, against International Harvester Company.[1] The action was filed in a Kentucky Circuit Court after petitioner's husband was fatally injured while operating a front-end loader manufactured by International Harvester (hereinafter "Harvester"). Petitioner alleged that her husband's death was proximately caused by Harvester's failure to include a rollover protection structure (ROPS) in the design of the front-end loader; thereby rendering the actual design defective.

[1]Two other defendants were also named in this action. After a jury verdict against all three defendants, two failed to perfect their appeals in state court. Accordingly, they are not involved in this appeal.

At trial Petitioner presented evidence that her husband would have survived the accident had the front-end loader been equipped with ROPS. Harvester's own expert admitted that at the time the loader was manufactured it was generally known throughout the industry that ROPS were available. Petitioner also presented the following evidence concerning the defective nature of Harvester's design:

1. At and before the time the loader was manufactured at least ten auxiliary equipment manufacturers were producing ROPS units for such equipment;
2. Prior to the date of manufacture, Harvester itself had purchased auxiliary ROPS units, incorporated them into front-end loaders, and sold the integrated unit as a harvester product;
3. Prior to the date of manufacture there were some

thirty-three regulations requiring ROPS on front-end loaders, including regulations imposed by the state of California, the United States Army Corps of Engineers, and the United States Bureau of Reclamation.

4. Harvester recognized the need for such roll-over protection in the early 1960's and field tested ROPS units substantially prior to the date of manufacture.

The trial court instructed the jury that they were to find for Petitioner and against Harvester if they concluded that the front-end loader was defectively designed and unreasonably dangerous to the user and if such design defect was a substantial factor in causing the death of Petitioner's husband. The jury returned a verdict in favor of Petitioner, awarding her approximately $2.1

million.[2]

Harvester appealed to the Kentucky Court of Appeals contending, inter alia, that the trial court erred in failing to grant its motion for a directed verdict. The Court of Appeals agreed and entered an order directing the circuit court to dismiss the claim against Harvester. The Court of Appeals based its decision on Kentucky Revised Statutes Sec. 411.310(2), which creates a presumption in favor of a manufacturer in a products liability case if the design at issue conformed either to industry standards or the state of the art existing at the time the product was designed and manufactured.

The Court of Appeals concluded that Harvester's evidence established conformity with industry standards

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[2] The jury concluded that 60% of the damages were attributable to Harvester. The remaining damages were assessed against the two additional defendants discussed supra at n.1.

and that Petitioner's evidence was insufficient to rebut the statutory presumption. In so doing, however, the court either discounted or ignored much of the evidence presented by Petitioner as to the safety of Harvester's design, the existence of industry standards mandating use of ROPS units, and the state of the art at the time the loader in question was manufactured. The court characterized Petitioner's evidence as "general" and conclusory. The court also discounted the testimony of one of Petitioner's expert witnesses apparently because he had testified in another case in which a verdict had been directed for the defendant.

In response to the Court of Appeals' decision Petitioner filed a motion for discretionary review with the Kentucky Supreme Court. The text of the relevant portions of said motion is set out in the Appendix at A 47 to

A 55. In the motion Petitioner pointed out that the Court of Appeals had virtually ignored Petitioner's evidence and had substituted its opinion for the jury's findings of fact. Petitioner's argument clearly raised the contention that the Court of Appeals' action constituted a denial of Petitioner's due process rights. This issue could not have been raised prior to the filing of said motion.

On October 26, 1983, the Supreme Court of Kentucky entered an order declining to review the Court of Appeals decision and ordering that said decision not be published.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals' decision was the first such decision involving Kentucky Revised Statutes 411.310(2), a provision which significantly affects all products liability actions in Kentucky. The court reversed a $2.1 million judgement on the basis of its selective reading of the evidence adduced at trial and its arbitrary determination as to the weight certain testimony should be given. The court's decision is an invitation to other appellate courts to ignore the conclusions of the finder of fact in such cases and arrive at their own conclusions based upon a "cold record." Such arbitrary and unreasonable action constitutes a denial of due process.

This Court currently has before it *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246, in

which one of the issues presented is whether a federal appellate court can deprive a party of compensatory damages by ignoring determinations of credibility made by the trial court. Petitioner submits that this case presents similar issues of equal importance to state court litigants.

This Court recently reaffirmed that a cause of action is a species of property protected by the fourteenth amendment's due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-31 (1982); *see also, Martinez v. California*, 444 U.S. 277, 281-82 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Similarly, rights acquired by a judgment and choses in action based upon contractual claims are property which cannot be extinguished without due process of law. *Louisiana ex rel. Folsam v. Meyer of New Orleans* 109 U.S.

285, 291 (1883) (Bradley, J. concurring); *Fontana v. Barham*, 707 F.2d 221, 226 (5th Cir. 1983); *Evans v. City of Chicago*, 522 F. Supp. 789, 796 (N.D. Ill. 1980). Thus, Petitioner's cause of action against Harvester and the jury's verdict against Harvester were both property protected by the due process clause. Petitioner was denied these property rights by virtue of the Court of Appeals' decision requiring entry of judgment for Harvester.

The question then becomes whether, under the circumstances, Petitioner was accorded the process she was due in connection with these rights. *Board of Regents v. Roth*, 408 U.S. 564 (1972). While due process cannot be precisely defined, it expresses a requirement of fundamental fairness. *Lassiter v. Department of*

Social Services, 452 U.S. 18, 24-25 (1981). The fourteenth amendment was intended to insure that state judicial proceedings reflect this fundamental fairness. *Id.* at 33.

It has long been recognized that a state appellate court decision which is arbitrary and capricious or in clear conflict with principles of jurisprudence established to protect and enforce private rights constitutes a denial of due process of law. *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927); *Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464 (1918). In addition, this Court has suggested that identifying what process is due in a particular situation requires consideration of several factors: (1) the private interest at stake; (2) the government's interest; and (3) the risk that the challenged procedure will lead to erroneous results and the pro

bable value of alternative procedures. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

The private interest at stake here is undisputedly important. The right to seek compensation for tortious injury is fundamental to our system of justice. In contrast, the state would appear to have no legitimate interest in permitting appellate courts to arbitrarily disregard trial court verdicts. Prohibiting such conduct certainly imposes no additional fiscal or administrative burdens on the state. Finally, the risk that such determinations may be erroneous is significant. This Court has recognized both the importance of the right to cross-examine witnesses and the problems of making factual determinations on the basis of a "cold record." *United States v. Raddatz*, 447 U.S. 667, 679 (1980); *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Goldberg v. Kelly*, 397 U.S. 254,

269 (1970). Thus, fundamental fairness requires that the conclusions of a jury, or any other fact-finder, not be ignored or discounted upon review by an appellate court. *See, Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 114-15 (1963); *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29, 35 (1944).

These considerations are reflected in decisions of the Kentucky Supreme Court regarding the proper scope of appellate review. These decisions forbid an appellate court to discount the probative value of expert testimony, re-evaluate the credibility of witnesses, or substitute its judgment for that of the jury on factual issues. *Rogers v. Kasdan*, 612 S.W.2d 133, 135 (Ky. 1981); *Barrett v. Stephany*, 510 S.W.2d 524, 529 (Ky. 1974); *Roland v. Murray*, 239 S.W.2d 967, 969 (Ky.

1951). The Court of Appeals in this case clearly violated all of the above precepts of proper appellate review. The court selectively cited evidence supporting Harvester's position while selectively ignoring evidence that the design at issue was unsafe and defective. The court characterized evidence which the jury apparently found convincing as general and conclusory. The court discounted the testimony of one expert witness merely because he had testified in a prior case in which a verdict had been directed for the defendant.

Thus, the action of the Court of Appeals was far more than improper appellate practice. It was an arbitrary and unreasonable deprivation of Petitioner's property rights. Providing a party a complete evidentiary hearing is of little value in securing that party's rights if an appellate

court is free to reweigh, reconsider and selectively ignore the factual conclusions of the trial court or jury. Nor can credibility judgments be fairly made by an appellate tribunal. While this Court is admittedly not in a position to prescribe state appellate procedures, this Court can and should address those situations in which state appellate courts usurp the role of the finder of fact and thereby arbitrarily deny litigants their property rights without due process of law.

CONCLUSION

Petitioner's cause of action arising from her husband's fatal injuries constituted valuable property rights protected by the fourteenth amendment. The Court of Appeals' arbitrary reevaluation of the evidence adduced at trial was a clear departure from the fundamental fairness required by the due process clause.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 1984, I have mailed three copies of this petition, first class postage prepaid, to each of the following parties:

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